

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES K. CURRY

Claimant

VS.

DURHAM D & M, LLC

Respondent

AND

OLD REPUBLIC INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,051,135

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the May 24, 2012, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Kip A. Kubin of Leawood, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 7, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

On December 6, 2011, respondent filed a Motion to Terminate Benefits based upon the report of Dr. P. Brent Koprivica. A preliminary hearing was held on February 7, 2012. On February 8, 2012, ALJ Avery issued two orders: an Order Referring Claimant for Independent Medical Evaluation by Dr. Terrence Pratt and an Order for Compensation continuing claimant's temporary total disability benefits. Those orders were not appealed. After receiving Dr. Pratt's report and without an additional hearing, ALJ Avery issued an Order for Medical Treatment dated May 24, 2012. The Order for Medical treatment required respondent to pay additional medical treatment for claimant with Dr. Pratt. Respondent appeals and asserted the only issue properly before the ALJ at the February 7, 2012, preliminary hearing was its Motion to Terminate Benefits. It argued the ALJ was without jurisdiction to order medical treatment with Dr. Pratt, because the requirements of

K.S.A. 44-534a were not followed by claimant. Specifically, the ALJ's Order for Medical Treatment was rendered without giving respondent an opportunity to be heard on the issue of additional medical treatment.

Claimant asks the Board to affirm ALJ Avery's Order for Medical Treatment and argues the ALJ did not exceed his jurisdiction. Claimant contends that by filing its Motion to Terminate Benefits, respondent asked for a change in claimant's benefits. The change in benefits requested was a termination of claimant's temporary total disability benefits and medical treatment. Because respondent raised this issue, claimant contends he was not required to demand a change in benefits, file an Application for Preliminary Hearing or request a preliminary hearing because those issues of preliminary benefits were already before the court.

Respondent puts forth the alternative argument that the report of Dr. Pratt does not support the May 24, 2012, Order for Medical Treatment issued by ALJ Avery. According to respondent, Dr. Pratt opined claimant's low back and knee symptoms related to claimant's 2007 accident, and were not the result of the alleged repetitive use injury. Claimant's position is that K.S.A. 44-534a does not give the Board jurisdiction to review an ALJ's preliminary Order granting additional medical care.

The issues are:

1. Did the ALJ exceed his authority by issuing the May 24, 2012, Order for Medical Treatment, which ordered that respondent pay for claimant's additional medical treatment with Dr. Pratt?
2. If not, does the Board have jurisdiction to review the ALJ's decision to order medical treatment for claimant with Dr. Pratt?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant filed two Applications for Hearing on the same date. One of the applications was filed in Docket No. 1,051,134, wherein claimant alleged he injured himself in a fall in 2007. In a preliminary Order, the ALJ denied claimant benefits based on claimant not filing a timely application for hearing. That Order was never appealed.

The other Application for Hearing was filed by claimant in Docket No. 1,051,135, in which claimant alleged a repetitive series of injuries from January 5, 2008, to November 8,

2009. The Application for Hearing lists extent of injuries as “Injured back, knees, shoulder, ribs, etc.”¹

This is the third time this claim has come before the Board for review of a preliminary Order. It is not necessary to set forth a complete history of the proceedings in this claim. In an August 12, 2010, preliminary Order for Compensation, the ALJ granted claimant’s request for temporary total disability benefits and medical treatment with Dr. Curtis. The ALJ found claimant’s date of accident to be June 14, 2010; claimant gave respondent timely notice of the accident; and claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent. Respondent appealed, and a Board Member affirmed the ALJ’s preliminary Order for Compensation.

Claimant was evaluated at the request of respondent on October 19, 2011, by Dr. P. Brent Koprivica. Dr. Koprivica’s report indicated claimant’s back and left knee injuries were not the result of his work activities. Based on Dr. Koprivica’s report, on December 6, 2011, respondent filed a Motion to Terminate Benefits. A preliminary hearing was held on February 7, 2012, to take up respondent’s motion. Dr. Koprivica’s report was made an exhibit at the preliminary hearing. Neither the parties nor ALJ Avery indicated that anything other than respondent’s Motion to Terminate Benefits was being taken up at the preliminary hearing. Claimant did not demand a change of physicians, file an Application for Preliminary Hearing or follow the procedures of K.S.A. 44-534a.

At the February 7, 2012, preliminary hearing, respondent indicated Dr. Curtis had quit treating claimant and asked the ALJ to terminate the August 12, 2010, preliminary Order for Compensation granting claimant temporary total disability benefits and ordering medical treatment for claimant with Dr. Curtis. Respondent introduced the October 19, 2011, report of Dr. Koprivica, which indicated there was no evidence that claimant suffered a cumulative injury to the lumbar spine from his bus driving activities. Dr. Koprivica also opined claimant’s left knee injury was the result of a fall in January 2007, not from a series of repetitive work activities during his employment with respondent. Claimant countered by introducing a letter dated April 15, 2011, and a medical report from neurosurgeon Dr. Harold A. Hess. Dr. Hess stated in the letter, “Certainly, a series of accidents over time can lead to exacerbation of this tear and then the degeneration of the disc, leading to the condition of discogenic pain. I would therefore relate his series of accidents as being the cause of this patient’s current condition.”²

Dr. Curtis had initially prescribed physical therapy, Lortab and a muscle relaxant for claimant. However, according to claimant, physical therapy had been discontinued approximately a year earlier and for the last year the only medical treatment received by

¹ Application for Hearing (filed June 14, 2010).

² P.H. Trans (Feb.7, 2012), Cl. Ex. 2.

claimant was the prescription medication. Claimant wanted additional medical treatment including additional physical therapy. Claimant testified at the preliminary hearing he had a disagreement with his treating physician, Dr. Curtis, over a letter Dr. Curtis received from another physician indicating claimant was prescribed Lortab by both doctors. Claimant thought he was being accused of abusing Lortab, a narcotic drug, by Dr. Curtis and the other physician. Claimant was also disgruntled because he appeared at a 2:30 p.m. appointment to see Dr. Curtis, but was told the appointment would have to be rescheduled.

On February 8, 2012, ALJ Avery issued an Order Referring Claimant for Independent Medical Evaluation by Dr. Terrence Pratt. The foregoing Order indicated Dr. Pratt was asked, among other things, to render an opinion regarding what, if any, additional medical treatment was necessary to cure and relieve the effects of a series of injuries suffered by claimant. ALJ Avery also issued an Order for Compensation on the same day, which continued claimant's temporary total disability benefits. At the February 7, 2012, preliminary hearing, neither party asked to keep the record open to submit any additional evidence.

In a letter to ALJ Avery dated May 15, 2012, and sent to both parties, Dr. Pratt recommended no further active treatment for claimant's low back injury, but did indicate an arthroscopic procedure was entertained for the left knee. The report was received by ALJ Avery on May 18, 2012. Dr. Pratt provided opinions regarding restrictions and permanent and pre-existing functional impairment. With regard to causation, Dr. Pratt stated,

There was a question concerning in some of the records repetitive activities or a specific event resulting in his involvement. His involvement of the knee and low back related to a specific vocationally related event in 2007. He reported some mild increase in symptoms after returning to work. I do not believe that those activities resulted in the involvement. The cause of his stated impairment was the reported fall.³

Without holding another preliminary hearing, ALJ Avery issued a May 24, 2012, Order for Medical Treatment, authorizing medical treatment for claimant to be provided by Dr. Pratt. In the Order for Medical Treatment, ALJ Avery stated,

Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier with Dr. Pratt and all referrals for potential knee surgery until further order. If the doctor, following completion of his/her own course of treatment of the claimant, deems it necessary that, in order to effect a cure and/or relief of the effects of claimant's injury, it is necessary for the claimant to continue to receive palliative care in the form of pain management, physical therapy or similar measures, the doctor is requested to refer (in writing) the claimant directly

³ Pratt Report (May 15, 2012) at 5.

to an appropriate provider. Failure to do so may result in an unnecessary delay in the claimant receiving needed care and additional legal proceedings.⁴

PRINCIPLES OF LAW AND ANALYSIS

On December 6, 2011, respondent filed a Motion to Terminate Benefits and attached a copy of Dr. Koprivica's report. Although respondent, by filing a Motion to Terminate Benefits instead of an Application for Preliminary Hearing, did not strictly follow the procedure set out in K.S.A. 44-534a, the matter went to a preliminary hearing. The ALJ wisely ordered Dr. Pratt to independently evaluate claimant to assist in determining whether additional medical treatment was necessary. The ALJ did not request a causation opinion from Dr. Pratt. Once Dr. Pratt's report was received by ALJ Avery, the ALJ issued an Order for Medical Treatment authorizing Dr. Pratt to treat claimant without holding another preliminary hearing.

Respondent argues that ALJ Avery exceeded his jurisdiction in his May 24, 2012, Order for Medical Treatment by changing physicians without claimant first requesting a change of benefits and without filing an Application for Preliminary Hearing or following the requirements of K.S.A. 44-534a. Respondent also objects to the fact that ALJ Avery issued his May 24, 2012, Order for Medical Treatment without giving respondent an opportunity to present additional evidence and without another hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2011 Supp. 44-551(i)(2)(A). Therefore, this Board Member will review whether the ALJ exceeded his authority in issuing the May 24, 2012, Order for Medical Treatment.

Respondent presented evidence at the February 7, 2012, preliminary hearing in support of its request to terminate benefits, including terminating claimant's medical treatment. It offered the report of Dr. Koprivica as evidence, to which there was no objection. Respondent cross-examined claimant and had an opportunity to present further evidence if it so desired. At the preliminary hearing, neither party asked to keep the record open in order to present further evidence. Dr. Pratt's report was received by the ALJ on May 18, 2012, and the ALJ issued the Order for Medical Treatment on May 24, 2012.

Once the ALJ received Dr. Pratt's report, which included the causation opinion, the parties should have been afforded the opportunity to have another preliminary hearing. Respondent should have been given a reasonable time after the ALJ and the parties received Dr. Pratt's report to object to the report or request a hearing. The ALJ's actions denied respondent due process. Dr. Pratt's opinion on causation was a game changer. Prior to the doctor's report, respondent was alleging claimant had reached maximum

⁴ Order for Medical Treatment (May 24, 2012).

medical improvement and was no longer in need of medical care. Dr. Pratt's causation opinion appears to indicate claimant's injuries were caused by his 2007 fall, not the repetitive series of accidents that gave rise to this claim.

Once a determination has been made that the ALJ exceeded his authority, it is unnecessary to determine whether the Board has jurisdiction to review the ALJ's ruling appointing Dr. Pratt as claimant's authorized treating physician.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

CONCLUSION

1. The ALJ exceeded his authority by issuing the May 24, 2012, Order for Medical Treatment.

2. It is not necessary for the Board to address the issue of whether it has jurisdiction to review whether the ALJ erred by ordering Dr. Pratt to provide medical treatment for claimant.

WHEREFORE, the undersigned Board Member remands for further hearing that part of the May 24, 2012, Order for Medical Treatment entered by ALJ Avery which orders medical treatment for claimant with Dr. Pratt.

IT IS SO ORDERED.

Dated this ____ day of September, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2011 Supp. 44-555c(k).

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Brad E. Avery, Administrative Law Judge